Petition

81-217

No. _____

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Respondent,

vs.

BILL GENE MORGAN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Should Defendant Morgan's conviction for conspiracy, under Count One of the Indictment, be reversed because the trial court refused to properly instruct the jury on reasonable doubt?

2. Does the lack of specificity in the charging Indictment and the resulting prejudice to Defendant Morgan mandate a reversal of his conviction on Counts Two and Four?

3. Should Defendant Morgan's conviction on Count Three be reversed because his Constitutional rights under the Fifth and Sixth Amendments were violated by the Government's action of returning aliens to Mexico?

PARTIES

In the United States Court of Appeals for the Ninth Circuit, the parties were: Idulfo Zavala-Pizano, Bill Gene Morgan, Truman Roberts and Gerald Wayne Dodson Petitioners-Appellants, and the United States of America, Respondent-Appellee.

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In the Supreme Court
OF THE
United States

UNITED STATES OF AMERICA,
Respondent,

vs.

BILL GENE MORGAN,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Bill Gene Morgan hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra, p.A-6) is a memorandum decision. Therefore, no citation is available. The District Court issued no written opinion.

JURISDICTION

The opinion of the Court of Appeals was issued on March 30, 1981. Rehearing was requested on April 10, 1981 and denied on June 16, 1981. The Ninth Circuit entered an order staying the issuance of the mandate of that Court pending the filing of a Petition for Writ of Certiorari to this Court, provided that such a Petition be filed with this Court on or before July 26, 1981. The ju-

risdiction of the Supreme Court to review this case on Petition for Writ of Certiorari is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

Fifth Amendment to the United States Constitution:

> "ARTICLE V
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Sixth Amendment to the United States Constitution:

> "ARTICLE VI
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On January 29, 1980, Bill Gene Morgan and numerous other defendants were indicted by a federal grand jury in the United States District for the District of Arizona. Count One of that Indictment charged all of the Defendants with having conspired to transport aliens within the United States in violation of Title 18, U.S.C. § 371. The remaining six counts charged various combinations of the Defendants with transporting aliens within the United States in violation of Title 8, U.S.C. § 1324(a)(2). Defendant Morgan was so charged in Counts Two, Three and Four.

The case was tried before the Honorable Thomas F. Murphy. On April 1, 1980, a jury returned a verdict finding Defendant Morgan guilty as to all counts charged. On April 24, 1980, he was sentenced to five (5) years imprisonment on Counts One through Four, sentences to run concurrently with each other. A fine of Ten Thousand and no/100 ($10,000.00) Dollars was imposed on Count One. Bond on Appeal was set at Five Thousand and no/100 ($5,000.00) Dollars. Defendant Morgan filed his Notice of Appeal on that day. The United States Court of Appeals for the Ninth Circuit had jurisdiction over that Appeal pursuant to 28 U.S.C. § 1291 and § 1294.

The evidence at trial in this matter involved testimony by various Government witnesses concerning the activities of the numerous Defendants and their alleged participation in the transporting of aliens across the border with Mexico into Arizona and from Arizona to various other States. In general, the testimony of the Government witnesses, nearly all of whom were unindicted co-conspirators, failed to identify or adequately describe the alleged criminal activity that occurred in any individual alien transporting trip. Instead, the Government's case amounted to presenting very few details about numerous trips to transport aliens.

William Danielson testified that in March of 1978 he owned a motor home business and was contacted by Defendant Dodson who wanted to rent motor homes to ship aliens. (RT4, 8)[1] On various different occasions, Danielson rented motor homes to Dodson, (RT9, 23, 26), Morgan (RT9, 29) and co-defendants Fleminger, (RT16) and Zavala (RT 37–38). Without giving many details, he testified to approximately seven (7) times when he rented homes to these people (RT 8–48). He testified to approximately how many persons were transported in some of the homes (RT 17, 25, 29), and seemed to know that most of the passengers were taken to Idaho (RT 12, 25, 27, 34, 39)

Specifically, Danielson testified to one trip to transport persons during the end of March 1978. (RT 23–25). The Defendants involved in this trip were Dodson, Galloway, Zavala, and potentially Morgan. Danielson further testified that he believed there were eighteen (18) persons transported in this motor home. The next trip about which Danielson testified occurred in April of 1978. (RT 25–27). The Defendants allegedly involved in this trip were Dodson, Galloway, Morgan and Fleminger. Danielson did not say how many persons were taken on this trip. Another trip also occurred in April (RT 28–35). Involved were Morgan, Zavala and Fleminger, who transported eighteen (18) persons. Danielson also testified that Zavala, Morgan and Fleminger were involved in additional trips to transport persons in early April (RT 37–41). Danielson's testimony necessarily was the evidence on which Defendant Morgan was convicted of the run described in Count II of the Indictment. A comparison of

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[1](RT_____) refers to the page of the reporter's trial transcript at which this evidence appears.

the Indictment and the testimony presented, however, fails to show for which trip he was convicted.

Keith Elsworth testified that he made one (1) trip, which culminated in his arrest in Nebraska on July 10, 1978 (RT 91). Agent James Lough, a criminal investigator for the immigration service, was assigned to the case in the summer of 1978 and testified to his investigation. (RT 403 *et seq*) Specifically, he admitted that after Elsworth was arrested in Nebraska, Bill Morgan became a "hot subject" and was investigated [illegible]nsively. (RT 427) Testimony further revealed that the [illegible]ns were arrested in a van that had been leased by Morgan, (RT 426) and the driver (Elsworth) had given Lough a piece of paper with Morgan's phone number on it, written in Morgan's handwriting. (RT 96, 114) Two or three days after Elsworth's arrest, Lough subpoenaed Morgan's phone records and completed a report on what they showed on Sept. 13, 1978. (RT 104, 404, 405) The records revealed that Morgan was involved and in communication with known alien smugglers and that the calls, even third party calls, were all billed to Morgan. (RT 406–407, 426, 482–486) Morgan's address and the addresses of the various known alien smugglers were obtained from these records (RT 406).

Count III of the Indictment charged Bill Morgan with being involved in this "Elsworth" trip. The Government released the aliens involved in this Count, to return to Mexico, on September 14 or 15, 1978 (RT 400, 503). The trial court specifically found that there was no doubt but that the aliens involved in Count III left this Country as a result of the unilateral action of the Government (RT 507).

John Henry testified to approximately ten (10) trips that he made to Chicago, Colorado and Idaho in order to transport aliens (RT 172–218). He frequently testified to approximately how many persons were trans-

ported but gave no meaningful description of his passengers or detail of any of the trips. George Cole testified to two (2) runs that he made, one to Chicago in August of 1978 with Henry, and one several months later with Anderson. (RT 237–240) Dave Anderson testified to making approximately seven (7) runs including trips to Chicago and Idaho with various persons. (RT 241–276) Anderson gave few details surrounding any of the trips and gave no description of the persons transported except to say that some spoke Spanish and appeared to be Mexican.

William Hall testified to making two (2) trips with Henry to Chicago and Idaho. (RT 276–293) Hall also gave few details of either trip. John Weisel testified to making approximately seven (7) runs to Chicago, Colorado, Phoenix and Idaho with various persons. (RT 295–313) He gave few descriptions of the circumstances surrounding these trips. Weisel, Henry and Anderson all testified to trips that they made to Chicago during the dates charged in Count IV of the Indictment. Weisel specifically stated that on his way to Chicago in September of 1978, he passed another Danielson motor home occupied by Henry and Anderson who were delivering passengers to the same place, at the same time. (RT 304)

None of the Defendants and none of the aliens who were allegedly transported testified.

REASONS FOR GRANTING THE WRIT

This Petition for Certiorari presents various important and special reasons why this Court should exercise its judicial discretion and grant review on Writ of Certiorari. This Court should exercise its power of supervision, because the Ninth Circuit Opinion has sanctioned the trial court's departure from the accepted usual course of judicial proceedings and has refused to recognize the error that occurred when the trial court failed to in-

struct the jury that the Defendant must be found guilty of conspiracy beyond a reasonable doubt.

The Ninth Circuit has also rendered a decision in this opinion that is in conflict with applicable decisions of this Court and another Courts of Appeal concerning the effect of a lack of specificity in the charging indictment and the resulting prejudice to the Defendant.

Last of all, the Ninth Circuit has in its Opinion indicated that the Government need not ever retain witnesses who are in this country illegally, if the Defendant has not been charged by the time the witnesses are deported. This is an important issue of Federal law that has not been, but should be settled by this Court. The necessity of resolving this issue is evidenced by the Government's request that the Ninth Circuit publish its memorandum opinion. The request to publish was denied.

1. *Morgan's Conviction for Conspiracy, Under Count One of the Indictment, Should be Reversed Because the Trial Court Refused to Properly Instruct the Jury on Reasonable Doubt.*

Despite objections of Defense Counsel, Judge Murphy never instructed the jury that the Defendant must be found guilty of conspiracy beyond a reasonable doubt. His failure to do so amounted to more than simply tailoring the parties' proposed jury instructions. Instead, the failure amounted to an abuse of discretion.

On two other occasions, Judge Murphy has been advised by the Ninth Circuit that he must instruct the jury on reasonable doubt. *United States -v- Brown*, 552 F.2d 10 (9th Cir. 1975) and *United States -v- Peterson*, 513 F.2d 1133 (9th Cir. 1975). In *Brown, supra* the Ninth Circuit criticized Judge Murphy and stated that the Defendant was correct in his assertion that the words "beyond a reasonable doubt" should have been inserted in

the instruction given by the Judge. However, since no objection was made to the instruction at trial, the error was found to not be reversible. In *Peterson, supra*, however, counsel did object at trial to Judge Murphy's deleting the words "beyond a reasonable doubt" from the proposed jury instructions, and the Ninth Circuit Court of Appeals held that the instruction was improper and constituted reversible error.

Although, in the instant case, the words "reasonable doubt" appeared in other instructions given by Judge Murphy, the jury was never specifically instructed that the Defendant's participation in the conspiracy itself must be proven beyond a reasonable doubt. Conspiracy is a difficult concept for experienced attorneys and must be exceedingly confusing to laymen. It becomes a device to convict the Defendant on an additional count for actions that already led to his conviction on substantive counts. Unless the jury is so instructed, it is unreasonable to assume that it will understand this complicated concept, or the fact that the elements of a conspiracy must be proven beyond a reasonable doubt.

Judge Murphy's actions, over the objection of Defense Counsel, amounted to more than a mere tailoring of the instructions and were in fact an abuse of discretion, which prejudiced the Defendant and rose to the level of reversible error. Defendant Morgan's conviction of conspiracy, under Count One of the Indictment, must, therefore, be reversed.

2. *The Lack of Specificity in the Charging Indictment and the Resulting Prejudice to Defendant Mandate a Reversal of Morgan's Conviction on Counts II and IV.*

The lack of specificity that occurred in Counts II and IV of the charging Indictment, and the variance that

resulted between Counts II and IV and the evidence presented at trial, rendered it impossible to determine with what Morgan was charged and for what the jury convicted him. Specifically, evidence was presented by witness Danielson of three distinct "runs" to transport aliens, anyone of which could have been the violation charged in Count II. Similarly, it is impossible to tell from the Indictment which one of the two "runs" testified to at trial was the subject matter of Count IV. Testimony revealed that the drivers of these two (2) vehicles even saw each other en route to the same location. Because the Indictment fails to allege the identity of any of the drivers or passengers or to identify the specific trip in any way, it is impossible to know for which trip Morgan was convicted in Count IV.

Such a situation violates Morgan's Fifth Amendment right to be charged with a felony only upon an indictment by a grand jury. In *Jeffers -v- United States*, 392 F.2d 749 (9th Cir. 1975), the Ninth Circuit Court of Appeals dealt with a similar situation and in so doing stated:

> "To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they rendered the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." 392 F.2d at 752-753.

In the instant case, we can only make a second guess as to which of the "runs" was in the minds of the Grand Jury at the time it returned Counts II and IV of the Indictment. This problem could have been eliminated by drafting Counts II and IV with more specificity. This could have been accomplished by simply identifying the

persons who actually made the runs, specifying the date of the runs, or naming any of the aliens allegedly transported. Defendant Morgan realizes that such details may not be statutorily required, but in the circumstances of the instant case, they were imperative.

As in the *Jeffers* case, the Indictment deprived Morgan of his basic right to be tried only on charges made by the grand jury. When any one of various separate instances could have been what the grand jury charged, and it is impossible to determine which was charged, the Defendant is deprived of this protection. Because Morgan has been deprived of his right to be tried only on charges made by the Grand Jury, he is entitled to a reversal of his conviction without any analysis of prejudice being necessary. *United States -v- Crocker,* 568 F.2d 1049 (3rd Cir. 1977).

A defendant is, however, also entitled to a reversal of his conviction when a variance occurs between the charging indictment and the proof at trial, even if such a variance does not deprive him of his right to be tried on charges presented to the grand jury, if he is prejudiced by the result. Defendant Morgan meets these requirements of prejudice.

An indictment provides substantial safeguards to a defendant, and a variance is fatal if it deprives the defendant of these safeguards. Specifically, the indictment must allow the defendant to present his defense properly, it must not take him unfairly by surprise, and it must not expose him to double jeopardy. *United States -v- Anderson,* 532 F.2d 1218 (9th Cir. 1976). As recognized by this Court in *Russell -v- United States,* 369 U.S. 749 (1962), a cryptic indictment, one not supported with adequate facts, makes the defendant go to trial with the chief issues undefined and allows the prosecution a free hand on appeal to fill in the gaps of proof by surmise and conjecture and to second-guess what was actually on the

minds of the Grand Jury at the time it returned the Indictment. In the case at bar, as in the *Russell* case, the Indictment in question charged the offenses using statutory language. However, the Indictment failed to enumerate additional specific facts that would sufficiently apprise the Defendant of what he must be prepared to meet at trial.

The Court of Appeals' opinion in the instant case holds that, because the Defendant was charged with conspiracy, he had to be prepared to defend against charges that smuggling trips took place during the entire time period in question, and he was, therefore, not prejudiced by lack of specificity in the Indictment. The fact that Defendant Morgan was charged with conspiracy did nothing to help him determine what was charged in substantive Counts II and IV. Moreover, the evidence presented by the prosecution did nothing to clarify the dilemma. Instead, the Government's shotgun approach of presenting but a small amount of evidence on a great volume of alien runs further prevented Morgan from preparing a defense to them.

At least, three separate runs could have been the run asserted in Count II. Had Defendant Morgan attempted to defend against Count II on the grounds that he was not involved in one of the three potential Count II runs, the Government would have obviously asserted that one of the remaining two runs had actually been charged. The same situation existed with the two virtually identical runs, either of which could have been the run charged in Count IV. The problems that have resulted to the Defendant because of the lack of specificity in the Indictment continue to be evident even on appeal. For example, in attempting to challenge the sufficiency of the evidence in Counts II and IV, the Defendant was obliged on appeal to challenge the sufficiency of the evidence of five separate trips and not merely two, because he had

no way of knowing which trips were actually charged in Counts II and IV.

Morgan has also been prejudiced by the fatal variance in Counts II and IV because of double jeopardy problems. In the instant case, even the trial record will not show for which runs he was convicted in Counts II and IV. The Government, if it so chose, could now charge Morgan with transporting aliens and could base the charge on any one of these five (5) runs, because the record at trial failed to prove on which runs Morgan has been charged and convicted.

Because Morgan has been deprived of his right to be tried only on charges made by the Grand Jury, and because he was substantially prejudiced by the variance that occurred between the Grand Jury's Indictment and the proof at trial, his convictions on Counts II and IV must be reversed.

3. *Morgan's Constitutional Rights Under the Fifth and Sixth Amendments Were Violated by the Government's Action of Returning Aliens to Mexico and Require a Reversal of His Conviction on Count III.*

The Court of Appeals' opinion in the instant case states that Defendant Morgan was not denied due process by the Government's action in returning potential witnesses to Mexico, because he had not been charged with any offense at the time of the release. A reading of *United States -v- Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971) and the numerous cases that have expanded on that opinion reveal that the crucial fact in determining whether Morgan's due process rights were violated is *not* whether he had been charged with any offense at the time of the release.

It is clear that the Government knew that Morgan

was involved with the alleged transportation and conspiracy at the time it released aliens back to Mexico. Morgan was, in the words of the investigating agent, a "hot subject," and was being investigated extensively by the Government before the aliens that were involved in Count III were released. The aliens were arrested in a van rented by Morgan, the driver gave a piece of paper with Morgan's phone number on it to the case agent and Morgan's phone records were subpoenaed and revealed that he was highly involved with known alien smugglers, all prior to the Government's release of the aliens. Additionally, extensive investigation and surveillance had already begun. Coincidently, the agent's report on what Morgan's phone records revealed was completed the day before the government sent the aliens to Mexico. Although the aliens had been here for in excess of two months, it now seemed important to send them home right away.

Despite this knowledge and investigation, the Ninth Circuit held that no duties were owed to Morgan, because the Government had not yet charged him with an offense at the time of the aliens' release. To allow the Government to release aliens to Mexico, simply by not charging the Defendant until after the release, is to present an enormous loophole that will totally emasculate the rights set out by this Court in *Mendez-Rodriguez, supra*. Admittedly, not every situation will require the Government to hold alien witnesses for a defendant who has not yet been charged. Such must carefully be reviewed on a case by case basis. The Defendant submits, however, that in his situation, the facts mandated that the Government not release the aliens. *See United States -v- Tsutagawa*, 500 F.2d 420 (9th Cir. 1974); *United States -v- Winnie Mae Manufacturing Co.*, 451 F. Supp. 642 (D.C.C.D. Ca. 1978). Such a holding need not impose substantial hardship on either the Government or the aliens

for it is proper for the Government to simply release the aliens to jobs within this Country. *United States -v- Verduzco-Macias*, 463 F.2d 105 (9th Cir. 1972).

In *United States -v- Tsutagawa, supra* the Ninth Circuit Court of Appeals rejected the Government's assertion that it was under no burden to retain apprehended aliens, because at the time the aliens were released, no definite charges had been filed against any of the Defendants. In so doing the court stated:

> "The facts were present — the acts allegedly violating the immigration laws were history. The charges were not yet made, but the Government was just as aware of the law it believed had been broken as it was in *Mendez-Rodriguez*." 500 F.2d at 423

Similarly, in *United States -v- Winnie Mae Manufacturing Co., supra*, aliens were released to Mexico before the defendants were charged with conspiring to harbor and conceal aliens and with substantive Counts of doing the same. The defendants' convictions on the substantive and conspiracy Counts were all reversed, because of the Government's unilateral act of deporting the aliens. The Court found that the Government had been conducting an active criminal investigation of the conspirators but had, nonetheless, failed to make any of the aliens available.

It is impossible to distinguish the instant cases from *Tsutagawa* or *Winnie Mae Manufacturing Co.* The Government attempted to do so by relying on *United States -v- Francisco-Romandia*, 503 F.2d 1020 (9th Cir. 1974) and *United States -v- Vega-Limon*, 548 F.2d 1390 (9th Cir. 1977). In both these cases the Defendant had been indicted before the aliens were released, but chose to remain at large. The Court found that this was proper because the Government need not retain witnesses for an

indicted but unapprehended defendant who may some day be caught and want to interview them.

It is reasonable to hold that if the Government charges a person with a crime and he chooses to remain at large, it is not the Government's burden to retain witnesses ad infinitum until he decides to turn himself in or is apprehended. It is totally unreasonable, however, to hold that a defendant must give up his Fifth Amendment right against self-incrimination and come forward and disclose himself as a participant in a crime for which he has not yet been charged in order to preserve his Fifth and Sixth Amendment rights that would otherwise be lost by the release of alien witnesses.

Quite simply the only reasonable interpretation of *Mendez-Rodriguez, Tsutagawa, Winnie Mae Manufacturing Co.*, and the remaining cases in this line of decisions is to hold that the Government may not be relieved of its obligation of retaining witnesses simply by postponing momentarily the filing of charges against a known defendant who is being extensively investigated and now, in the words of the case agent is "a hot subject."

CONCLUSION

For these reasons, Writ of Certiorari should issue to review the Judgment in the opinion of the Ninth Circuit.

Respectfully submitted,

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Three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit have been mailed this 24 day of July, 1981, to the Office of:

The Solicitor General
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Washington, D.C. 20530

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, *Plaintiff,* vs. BILL GENE MORGAN aka Billy Jean Polk, *Defendant.*	INDICTMENT Violations: 18 USC § 371 8 USC § 1324(a)(2) (Conspiracy to transport illegal aliens; transportation of illegal aliens)

THE GRAND JURY CHARGES:

COUNT I

That commencing on or about March 10, 1978, and continuing until on or about May 31, 1979, at or near Nogales, Sonora, Mexico, and at or near Phoenix and Nogales, and elsewhere in the District of Arizona, and in the Northern District of Illinois and the Districts of Idaho, Nebraska, and Colorado, Idulfo Zavala-Pizano aka Jaime Zavala, Jose Zavala-Pizano, Bill Gene Morgan aka Billy Jean Polk, Suzanne Ann Fleminger aka Suzanne Agnes Boyd, Truman Roberts, Ted L. Eisenhart, Jeova Zurita aka Joe or Jose, Maria Zurita aka Mary, Gerald Wayne Dodson, Charles Forrest Bernard, Russell Lee Galloway, John William Weisel, George Raymond Cole, Bill Hall, and Jodene Lee Carnes, did knowingly and intentionally conspire with each other and with other persons, some of whose names are unknown to the Grand Jury, to com-

mit offenses which were in violation of Title 8, United States Code, Section 1324(a)(2).

It was the object of said conspiracy that all or some of the defendants, knowing that one or more aliens were or would be in the United States of America illegally and knowing or having reason to believe that those aliens' last entry into the United States occurred or would occur less than three years prior thereto, would knowingly and intentionally transport and move, and would attempt to transport and move, said aliens within the United States of America by means of transportation and otherwise in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

In furtherance of said conspiracy and to accomplish the object thereof, the following overt acts were committed at the times and places set forth below:

1. On or about March 29, 1978, Bill Gene Morgan aka Billy Jean Polk traveled from the Phoenix area to the vicinity of Nogales, Arizona;

2. On or about April 29, 1979, Jodene Lee Carnes traveled to near Sonoita, in the District of Arizona, in a motorhome vehicle;

All in violation of Title 18, United States Code, Section 371.

COUNT II

That from on or about March 25, 1978, until on or about March 29, 1978, at or near Nogales and Phoenix, in the District of Arizona, and in the District of Idaho, Idulfo Zavala-Pizano aka Jaime Zavala, Jose Zavala-Pizano, Bill Gene Morgan aka Billy Jean Polk, Suzanne Ann Fleminger aka Suzanne Agnes Boyd, Gerald Wayne Dodson, and Russell Lee Galloway, knowing that approximately 28 aliens were in the United States illegally

and knowing or having reason to believe that those aliens' last entry into the United States occurred less than three years prior thereto, did knowingly and intentionally transport and move, and attempt to transport and move, those aliens within the United States of America by means of transportation and otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT III

That on or about July 9, 1978, at or near Phoenix, in the District of Arizona, and in the District of Nebraska, Idulfo Zavala-Pizano aka Jaime Zavala, Jose Zavala-Pizano, Bill Gene Morgan aka Billy Jean Polk, Suzanne Ann Fleminger aka Suzanne Agnes Boyd, Ted L. Eisenhart, Jeova Zurita aka Joe or Jose, Maria Zurita aka Mary, knowing that approximately 28 aliens were in the United States of America illegally and knowing or having reason to believe that those aliens' last entry into the United States of America occurred less than three years prior thereto, did knowingly and intentionally transport and move, and attempt to transport and move, those aliens within the United States of America by means of transportation and otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT IV

That from on or about September 23, 1978, until on or about September 25, 1978, at or near Sonoita and Phoenix, in the District of Arizona, and at or near Chicago, in the Northern District of Illinois, Idulfo Zavala-Pizano aka Jaime Zavala, Jose Zavala-Pizano, Bill Gene Morgan aka Billy Jean Polk, Jeova Zurita aka Joe or Jose, Maria Zurita aka Mary, knowing that approxi-

mately 20 aliens were in the United States of America illegally and knowing or having reason to believe that those aliens' last entry into the United States of America occurred less than three years prior thereto, did knowingly and intentionally transport and move, and attempt to transport and move, those aliens within the United States of America by means of transportation and otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT V

That in approximately mid-March of 1979, at or near Phoenix, in the District of Arizona, and in the District of Idaho, Idulfo Zavala-Pizano aka Jaime Zavala, Jose Zavala-Pizano, Truman Roberts, and John William Weisel, knowing that approximately 20 aliens were in the United States illegally and knowing or having reason to believe that those aliens' last entry into the United States of America occurred less than three years prior thereto, did knowingly and intentionally transport and move, and attempt to transport and move, those aliens within the United States of America by means of transportation and otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT VI

That on or about March 28, 1979, at or near Sonoita and Phoenix, in the District of Arizona, Idulfo Zavala-Pizano aka Jaime Zavala, Jose Zavala-Pizano, and Truman Roberts, knowing that approximately 36 aliens were in the United States illegally and knowing or having reason to believe that those aliens' last entry into the United States occurred less than three years prior thereto, did knowingly and intentionally transport and move, and

attempt to transport and move, those aliens within the United States of America by means of transportation and otherwise, in furtherance of such violation of law, in violation of Title 8 United States Code, Section 1324(a)(2).

COUNT VII

That on or about April 29, 1979, at or near Sonoita, in the District of Arizona, Idulfo Zavala-Pizano aka Jaime Zavala, Jose Zavala-Pizano, and Truman Roberts, knowing that approximately 29 aliens were in the United States of America illegally and knowing or having reason to believe that those aliens' last entry into the United States of America occurred less than three years prior thereto, did knowingly and intentionally transport and move, and attempt to transport and move, those aliens within the United States of America by means of transportation and otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BILL GENE MORGAN,
Defendant-Appellant.

(Filed: March 30, 1981)
Nos. 80-1264
80-1265
80-1266
80-1267

MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
The Honorable Thomas F. Murphy, Presiding
Argued and Submitted December 9, 1980

Before: HUG and CANBY, Circuit Judges, and EAST*, District Judge.

Appellants in this consolidated appeal were indicted by a federal grand jury on one count of conspiracy to transport illegal aliens, in violation of 18 U.S.C. § 371, and from one to six counts of transportation of illegal aliens, in violation of 8 U.S.C. § 1324(a)(2). Following a jury trial, all appellants were convicted on the conspiracy count and at least one transportation count. Appellants raise numerous issues on appeal, most of which are common to two or more parties.

Appellants argue that the evidence produced by the Government at trial is insufficient to support their convictions on the transportation counts. In reviewing the sufficiency of the evidence to support a conviction, the reviewing court views "the evidence in the light most favorable to the Government. The verdict of the jury will be upheld if there was relevant evidence from which the

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

jury could reasonably have found the defendant guilty beyond a reasonable doubt." *United States v. Friedman*, 593 F.2d 109, 115 (9th Cir. 1979) (citations omitted). Several persons who had participated in the smuggling operation gave testimony regarding the persons who were transported and the details of the trips which were made and money that was paid. We hold that there was sufficient evidence to support the finding of the jury.

Appellants next argue that their convictions should be reversed because the trial court improperly instructed the jury. While the instructions were not given in the exact form recommended by the parties, we hold that the instructions as given were adequate. The trial court has "substantial latitude in tailoring [jury] instructions." *United States v. James*, 576 F.2d 223, 226 (9th Cir. 1978). Challenges to the "language or formulation of the charge are reversible only for an abuse of discretion." *Id.* at 227. There was no abuse of discretion here.

Appellants argue that their convictions should be reversed as a result of the duplicitous nature of the indictment under which they were charged. The relevant statute, 8 U.S.C. § 1324(a)(2), provides that a five-year sentence may be imposed for each alien transported. Appellants assert that the indictment must thus contain a separate count for each alien, rather than charge the transportation of numerous aliens in each count. None of the appellants received more than a five-year sentence on any one count, however. They were thus not prejudiced by the form of the indictment.

Appellants also attack the indictment for the lack of specificity. As a result of the conspiracy count, appellants had to be prepared to defend against charges that smuggling trips took place during the entire time period in question. They were thus not sufficiently prejudiced by any lack of specificity in the indictment to require reversal.

Appellants assert that the trial judge committed reversible error by commenting on the veracity of a government witness, by allowing witnesses to describe the persons transported as "aliens," and by refusing to permit sidebar conferences. A review of the record reveals that the trial judge was not in reality commenting on the witness's veracity. Rather, he was attempting to expedite cross-examination by pointing out that the questioning was repetitive. The use of the word "aliens" did not prejudice appellants sufficiently to require reversal. We note that the witnesses did not call the persons transported "illegal aliens." It was not improper for the judge to refuse sidebar conferences under the circumstances.

Finally, appellants assert that they were denied due process by the Government's action in returning potential witnesses to Mexico. *See United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971). The trial court held a hearing on this issue below and found that the release of the aliens who returned to Mexico was not improper. We agree; the defendants in this case had not been charged with any offense at the time of the release.

The remaining issues raised by appellants are without merit.

The convictions are AFFIRMED.

(Title of Action)
(FILED: June 16, 1981)

ORDER

Before: HUG and CANBY, Circuit Judges, and EAST*, District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearings. Judges Hug and Canby have voted to reject the suggestions for their rehearings en banc and Judge East recommends rejection of their suggestions.

The full court has been advised of the en banc suggestions and no judge of the court has requested a vote on them. Fed. R. App. P. 35(b).

The petitions for rehearings are denied and the suggestions for rehearings en banc are rejected.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

(Title of Action)
(FILED: July 6, 1981)

ORDER ON MOTIONS FOR
STAY OF MANDATE

Before: HUG and CANBY, Circuit Judges, and EAST*, District Judge

Upon application of counsel for the appellants, Zavala-Pizano, Morgan and Roberts, and good cause appearing therefor,

IT IS ORDERED that, under Rule 41(a) of Fed. R. App. P., the issuance of the mandate of this court in each cause above, be and hereby is stayed, as to the three named appellants, pending the filing with, and consideration and disposition by, the Supreme Court of the United States, of petitions for writs of certiorari to be made by the three named appellants, provided each such petition is filed in the United States Supreme Court Clerk's Office on or before July 26, 1981. In the event any such petition for writ of certiorari is granted, this stay will continue pending the final disposition of any such case by the Supreme Court of the United States, pursuant to Rule 41(b), Fed. R. App. P.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.